

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERTO T. CABELLO

Claimant

VS.

LA SIESTA FOODS, INC.

Respondent

Self-Insured

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Docket No. 216,054

ORDER

Respondent appeals from an Award entered by Administrative Law Judge Bryce D. Benedict on December 24, 1997.

APPEARANCES

Beth Regier Foerster of Topeka, Kansas, appeared on behalf of the claimant. James C. Wright of Topeka, Kansas, appeared on behalf of the respondent, a qualified self-insured.

RECORD AND STIPULATIONS

The Appeals Board has reviewed the record listed in the Award and has adopted the stipulations listed in the Award.

ISSUES

The sole issue on appeal is the nature and extent of claimant's disability. The ALJ awarded benefits for a 20 percent permanent partial impairment of the left upper extremity at the shoulder level. Respondent argues that the decision by the ALJ improperly failed to consider a rating of 5 percent by the treating physician.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and after considering the arguments, the Appeals Board concludes that the Award by the ALJ should be affirmed.

Claimant injured his left shoulder on June 19, 1995, when he fell in a parking lot, owned by respondent, on his way to work. He dislocated the acromioclavicular joint and underwent distal clavicle resection and coracoclavicular ligament reconstruction. The July 15, 1996, notes from the treating physician, Dr. Michael J. Schmidt, show a rating of 5 percent to the left upper extremity.

Claimant was also evaluated by Dr. Edward J. Prostic on October 28, 1996. Dr. Prostic concluded there was a 20 percent impairment of the arm at the shoulder level. Dr. Prostic recommended claimant avoid heavy lifting, forceful pushing or pulling, and engage in minimal use of the hand at or above the shoulder.

Finally, claimant was evaluated by P. Brent Koprivica, M.D., at the request of the ALJ. Dr. Koprivica also found 20 percent impairment at the shoulder level. Dr. Koprivica recommended claimant avoid overhead reaching, repetitive pushing and pulling, and limit weighted overhead activities to 20 pounds.

The ALJ adopted the 20 percent impairment rating given by the neutral physician. The Appeals Board agrees. The rating by Dr. Schmidt was given on July 15, 1996. At that time, Dr. Schmidt recommended no restrictions. Claimant thereafter reported an increase in symptoms and returned to Dr. Schmidt. On June 26, 1996, Dr. Schmidt did place restrictions but his records indicate no reevaluation of the impairment rating.

The Appeals Board considers it reasonable, in this case, to rely upon the opinion of Dr. Koprivica, an opinion supported by the opinion of Dr. Prostic, both because he was the court-appointed neutral physician and because his rating was given after claimant experienced an increase of symptoms.

AWARD

WHEREFORE, the Appeals Board finds that the Award by Administrative Law Judge Bryce D. Benedict, dated December 24, 1997, should be, and the same is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1998.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Beth Regier Foerster, Topeka, KS
James C. Wright, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director